

The Honorable Richard A. Jones

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

**UNITED FEDERATION OF
CHURCHES, LLC d/b/a THE SATANIC
TEMPLE,**

Plaintiff,

v.
DAVID ALAN JOHNSON, an individual;
LEAH FISHBAUGH, an individual;
MICKEY MEEHAM, an individual; and
NATHAN SULLIVAN, an individual,

Defendants.

No. 2:20-cv-00509-RAJ

**DEFENDANTS' REPLY IN SUPPORT
OF MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

**NOTED ON MOTION CALENDAR:
July 2, 2021**

**REPLY IN SUPPORT OF
MOTION TO DISMISS
No. 2:20-cv-00509-RAJ**



ARÈTE LAW GROUP
1218 THIRD AVE., STE 2100
SEATTLE, WA 98101
O: (206) 428-3250

I. INTRODUCTION

The Satanic Temple’s (“TST”) Response to Defendants’ Motion to Dismiss (“Response”) fails to show that TST has adequately pled any of its claims. TST’s Second Amended Complaint (“SAC”) must be dismissed.

II. ARGUMENT

A. The Satanic Temple Fails to State a Hacking Claim under the CFAA

1. TST Fails to Allege Access was not Authorized by the Computer Owners

TST devotes not one word to a fundamental flaw in its CFAA hacking claim—that it fails to allege that any of the owners of the computers at issue here (Facebook, Twitter, or Google) revoked Defendants’ authorization to access those computers. Indeed, as to the Chapter Page, TST affirmatively alleges that at the time of the conduct at issue Facebook *explicitly determined that Johnson’s access and alteration were authorized*. See SAC ¶ 63. Because TST has failed to allege that the computer owners did not permit Defendants to access those computers, the CFAA claim must be dismissed. *Courser v. Allard*, 969 F.3d 604, 619 (6th Cir. 2020).

2. TST Fails to Plead that it Revoked Defendants' Authority to Access Computers

Applicable caselaw is abundantly clear that to assert a CFAA claim based upon “access[] . . . without authorization” against a defendant who had authority to access a protected computer, a plaintiff must plead that it entirely and *explicitly* revoked the defendant’s authority. *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1067 (9th Cir. 2016) (“a defendant can run afoul of the CFAA when he or she has no permission to access a computer or when such permission has been revoked *explicitly*”) (emphasis added); *Ticketmaster L.L.C. v. Prestige Entm’t, Inc.*, 306 F. Supp. 3d 1164, 1175-76 (C.D. Cal. 2018); *Domain Name Comm’n v. DomainTools, LLC*, 449 F. Supp. 3d 1024, 1027 (W.D. Wash. 2020).

123 Los Robles LLC v. Metzler, No. 2:17-CV-00392-RGK-SK, 2017 WL 10311210 (C.D. Cal., Aug. 14, 2017), is instructive. In that case, after discovering that Metzler, the limited liability company's managing member and bookkeeper, had embezzled over \$100,000 from the company,

1 the other members of the company removed Metzler as managing member. 2017 WL 10311210,
 2 at *1. They further instructed that the company’s bank disable Metzler’s ability to access the
 3 company’s banking records, which the bank failed to do. *Id.* Almost three years later, the company
 4 discovered that Metzler had been accessing its banking records “continuously and systematically”
 5 and asserted a CFAA hacking claim against him. The *123 Los Robles* Court found that despite
 6 Metzler’s removal as managing member and bookkeeper, the purported revocation of his authority
 7 to access the company’s banking records from a protected computer was insufficiently explicit to
 8 support a CFAA claim. *Id.* at *3.

9 TST’s revocation allegations are limited to the following:

10 On March 12, 2020, TST’s Washington leadership removed Defendants from their
 11 advisory positions.

12 Defendants’ positions on the advisory council entailed the authorization to manage
 13 the Chapter’s social media activity. By removing Defendants from their advisory
 14 positions, the Washington Chapter leadership revoked Defendants’ authorization to
 15 manage the Chapter’s social media activity and revoked Defendants’ authorization
 16 to serve as custodians of records.
 17
 18 . . .

19 Following Meeham’s [sic, Meehan’s] usurpation of the Allies page, the
 20 Washington Chapterhead removed all defendants from administrative access
 21 privileges to the remaining social media accounts. More specifically, the
 22 Chapterhead removed all administrative privileges of Johnson, Fishbaugh, Meeham
 23 [sic, Meehan], and Sullivan to the Facebook Chapter account and the Twitter and
 24 Google accounts referenced herein.

25 SAC ¶¶ 43-44, 49. These allegations fall well short of explicit revocation of authority as required
 26 in the Ninth Circuit. Removal of Defendants from their “advisory positions,” which TST suggests
 27 implicitly caused removal of “administrative privileges” to the social media accounts, is as
 28 insufficiently explicit as the LLC’s removal of Metzler as managing member and bookkeeper. *123*
Los Robles, 2017 WL 10311210, at *3. Further, even if the allegation of “remov[al] of all
 29 administrative privileges” were explicit, such purported removal is not the same as a complete and
 30 explicit revocation of authority to access the social media accounts. Accordingly, TST has failed
 31 adequately to plead that authority to access those accounts was explicitly revoked.

1 **3. TST Fails to Plead that it Informed Defendants of any Revocation of Authority**

2 “In cases in which the employer rescinded authorization, the Ninth Circuit has required
 3 that revocation be ‘unequivocally conveyed’ to the defendant.” *123 Los Robles*, 2017 WL
 4 10311210, at *2 (quoting *United States v. Nosal (Nosal II)*, 844 F.3d 1024, 1028 (9th Cir. 2016)).
 5 Even if this Court finds that TST explicitly revoked Defendants’ authority to access the social
 6 media accounts, TST’s demand for return of the Chapter page and threatening litigation are
 7 insufficient to show that the purported revocation was “unequivocally conveyed” to Defendants.
 8 *Id.*; see also *DomainTools*, 449 F. Supp. 3d at 1027; *Power Ventures*, 844 F.3d at 1068; Dismissal
 9 Order at 8 (rejecting TST’s contention that “it demanded return of the Facebook pages” as
 10 insufficient revocation of authority, in part, because it failed to describe “how that revocation was
 11 communicated”).

12 **4. TST Fails Adequately to Plead it Meets the \$5,000 “Loss” Threshold**

13 In a striking mis-statement of the law, TST asserts that the \$5,000 “loss” threshold “is
 14 irrelevant at the pleading stage. . . . The \$5,000 jurisdictional threshold only matters under 18
 15 U.S.C. § 1030(a)(4) . . . But, as the Court pointed out, TST relies on 18 U.S.C. § 1030(a)(2)(C).”
 16 Response at 6. Before addressing this incorrect statement of law, now that TST explicitly has
 17 disavowed a claim under 18 U.S.C. § 1030(a)(4) in favor of 18 U.S.C. § 1030(a)(2)(C), yet another
 18 ground for dismissal is apparent. Subparagraph 1030(a)(2)(C) prohibits access without
 19 authorization or in excess of authorized access to obtain “information from any protected
 20 computer.” 18 U.S.C. § 1030(a)(2)(C). Although TST contends that “Defendants obtained
 21 information about the approved administrators,” Response at 4, the SAC is *devoid* of any allegation
 22 that Defendants’ alleged improper access to the protected computers allowed them to obtain
 23 “information” in violation of 18 U.S.C. § 1030(a)(2)(C). Rather, the obvious gravamen of the SAC
 24 is that Defendants’ alleged improper access allowed them to *add* information to those computers
 25 that TST did not like. Accordingly, TST’s CFAA claim must be dismissed for failure to allege
 26 Defendants improperly accessed the computers to obtain information.

1 Turning to TST’s assertion that the \$5,000 threshold is not relevant here, while TST
 2 correctly observes that the \$5,000 threshold is an element for a CFAA claim under 18 U.S.C. §
 3 1030(a)(4), TST completely ignores 18 U.S.C. § 1030(g), which provides in relevant part that “[a]
 4 civil action for a violation of this section may be brought only if the conduct involves 1 of the
 5 factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i).”¹ The only
 6 subclause of subsection (c)(4)(A)(i) that conceivably could apply here is (I)—“loss to 1 or more
 7 persons during any 1-year period . . . aggregating at least \$5,000 in value.”² Accordingly, to
 8 withstand a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a CFAA civil plaintiff must plausibly allege
 9 “loss” exceeding \$5,000. *DomainTools*, 449 F. Supp. 3d at 1030.

10 TST “alternatively” argues that it has pled a sufficient loss, pointing to two categories: “(1)
 11 the lost ability to communicate to an audience which TST had built through years of effort (SAC,
 12 ¶¶ 51-68); and (2) the 20-30 lost members.”³ Response at 7. In the SAC the only specifics TST
 13 offers as to the amount of its loss are:

14 There is a cognizable dollar value to social media accounts. Preliminary estimates
 15 of the “loss” related to the misappropriation of the Chapter page is \$33,689.70, plus
 16 \$1,037.52 for the Allies page. The Twitter page, if successfully misappropriated,
 17 would have lost \$8,246.70.⁴

18 SAC ¶ 77. As to the first category of loss, TST has alleged nothing to quantify the conclusory
 19 value of the alleged lost ability to communicate with its audience. The number appears to have
 20 been pulled out of thin air. The second category of loss fares no better. TST alleges no facts
 21 indicating the value of the alleged lost 20-30 members. Does TST estimate its damages based on
 22 the amount of donations per member? On membership fees? Something else? Did TST

22 ¹ In contrast to TST’s false contention that no \$5,000 threshold need be established in its Response, its SAC
 23 recognizes that to assert a civil claim under the CFAA a \$5,000 loss is required. See SAC ¶ 70.

24 ² The remaining subclauses of subsection (c)(4)(A)(i) listed in 18 U.S.C. § 1030(g) are “(II) the modification or
 25 impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1
 or more individuals; (III) physical injury to any person; (IV) a threat to public health or safety; [and] (V) damage
 affecting a computer used by or for an entity of the United States Government in furtherance of the administration of
 justice, national defense, or national security.” Not one of those subclauses is supported by the SAC’s allegations.

26 ³ TST also asserts in its brief that it suffered “damage . . . to the website.” Response at 8. But the SAC lacks any
 quantification of the “loss” value of that purported damage.

27 ⁴ TST offers no “loss” figure relating to the alleged hacking of the Google account.

1 commission a marketing expert to determine the value of the purportedly temporarily lost website?
 2 We have no idea. Such conclusory loss allegations fall well short of supporting the \$5,000 loss
 3 element of a civil CFAA hacking claim. *Delacruz v. State Bar of Cal.*, No. 16-cv-06858-BLF,
 4 2018 WL 3077750, at *8 (N.D. Cal., Mar. 12, 2018); *Brodsky v. Apple Inc.*, No. 19-CV-00712-
 5 LHK, 2019 WL 4141936, at *8 (N.D. Cal., Aug. 30, 2019).

6 Moreover, the revenue allegedly lost from TST members who allegedly left due to
 7 Defendants' actions simply does not apply to the \$5,000 loss threshold. Although "lost revenue
 8 incurred because of an interruption of service falls within the definition of 'loss,' . . . claims of lost
 9 business opportunities, damaged reputation, loss of assets, and other missed revenue . . . do not
 10 constitute 'loss.'" *Eagle v. Morgan*, No. 11-4303, 2011 WL 6739448, at *9 (E.D. Pa., Dec. 22,
 11 2011). In other words, if, for example, members of TST were unable to donate due to interruption
 12 of service on the Facebook page, such lost revenue *might* count toward the loss threshold. But that
 13 is not what TST is alleging. Rather, TST contends that because of Defendants' actions as to the
 14 social media accounts, some of its members became disaffected and did not donate. This is not
 15 due to "interruption of service," but rather, if anything, a "lost business opportunit[y], damaged
 16 reputation, . . . and other missed revenue," which plainly "do not constitute 'loss.'" *Id.*

17 TST also contends that attorney's fees qualify as a "loss." Response at 7. While attorney's
 18 fees incurred in *remediating* harm from a CFAA may count as a "loss," attorney's fees incurred in
 19 *prosecuting* a CFAA claim do not. *Wichansky v. Zowine*, 150 F. Supp. 3d 1055, 1071-72 (D. Ariz.);
 20 *Wilson v. Moreau*, 440 F. Supp. 2d 81, 110 (D.R.I. 2006), *aff'd* 492 F.3d 50 (1st Cir. 2007). TST
 21 has pled that it incurred \$6,000 in preparing its complaint. SAC ¶ 79. That is plainly a litigation
 22 expense that courts do not count for the \$5,000 CFAA loss threshold.

23 Finally, TST does nothing to address that its loss allegation as to the Allies page is only
 24 slightly more than \$1,000. Because "loss" is evaluated on a computer-by-computer basis, TST
 25 cannot meet the \$5,000 threshold as to the Allies page. *Hayes v. Packard Bell NEC, Inc.*, 193 F.
 26 Supp. 2d 910, 912 (E.D. Tex. 2001).

1 **5. TST Fails to Allege Fishbaugh's and Sullivan's Involvement in the Alleged
2 CFAA Violations or how Meehan's Alleged Actions were Fraudulent**

3 TST does not address (1) that it failed to allege Fishbaugh's and Sullivan's involvement
4 in the purported CFAA violations, (2) how Meehan's alleged actions were fraudulent, or (3) the
5 entirely conclusory "loss" allegation as to Johnson's alleged attempted hacking of the Twitter
6 account. Accordingly, TST's claims against Sullivan, Fishbaugh, Meehan, and Johnson (as to the
7 Twitter account) must be dismissed for failure to allege essential elements or plead the fraudulent
8 aspect of an 18 U.S.C. § 1030(a)(4) claim with particularity. *See Motion at 14-16.*

9 **B. TST Fails Adequately to Plead a Claim for Tortious Interference**

10 A tortious interference claim requires that the interference be "wrongful by some measure
11 beyond the fact of the interference itself." *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn.
12 App. 502, 510, 278 P.3d 197 (2012). TST correctly notes that the "wrongful" element can be
13 established by reason of a statute or other regulation, or a recognized rule of common law, or an
14 established standard of trade or profession. Response at 10 (citing *Pleas v. City of Seattle*, 112
15 Wn.2d 794, 803-04, 774 P.2d 1158 (1989)). Yet, TST does not even attempt to explain how it has
16 met this requirement and indeed, it has not. It has not alleged any violation of a statute, regulation,
17 common law or an established standard or trade or profession.

18 Instead, TST argues that Defendants published derogatory messages about TST on its
19 Facebook pages for the purpose of harming it, and that this conduct should satisfy the improper
20 purpose/wrongful means element. Response at 10-11. This argument is essentially a repackaging
21 of its defamation claim that the Court dismissed on First Amendment grounds. Dkt. No. 20. As
22 with its defamation claim, TST again points to Defendants' criticisms, including that TST
23 leadership are cozy with the alt-right, are white supremacists, and do not conform to the
24 Defendants' impression of Satanism. Response at 11 (citing, *inter alia*, SAC ¶¶ 52 and 55). These
25 are the very types of statements that the Court found it was barred from delving into by the
26 ecclesiastical abstention doctrine. Dkt. No. 20 at 18 ("That would require the Court or jury to

1 define the beliefs held by The Satanic Temple and to determine that ableism, misogyny, racism,
 2 fascism, and transphobia fall outside those beliefs. That the Court cannot do without violating the
 3 First Amendment.”). TST should not be allowed to perform an end-run around the First
 4 Amendment or the Court’s Order by restyling its defamation claim as a tortious interference claim.
 5 Just as the First Amendment required dismissal of the defamation claim, so does it require
 6 dismissal of a tortious interference claim based on the same statements. *See, e.g., Ogle v. Church*
 7 *of God*, 153 F. App’x 371, *4 (6th Cir. 2005) (First Amendment barred the exercise of subject
 8 matter jurisdiction over claim for tortious interference with business relationships); *Jennison v.*
 9 *Prasifka*, 391 S.W.3d 660, 668 (Tex. App. 2013) (ecclesiastical abstention doctrine applied to
 10 tortious interference claim); *Cnty. Econ. Dev., Inc. v. Cote*, No. TTD CV 07-5001261-S, 2008 WL
 11 5481209, at *4 (Conn. Super. Ct., Dec. 1, 2008) (“Thus, it has been held that the ministerial
 12 exception is . . . equally applicable to defamation and tortious interference claims linked to church
 13 discipline where religious doctrine, faith or internal organization is involved.”); *Goodman v.*
 14 *Temple Shir Ami, Inc.*, 712 So. 2d 775, 777 (Fla. Dist. Ct. App. 1998) (dismissing tortious
 15 interference and defamation claims pursuant to the ecclesiastical abstention doctrine).⁵

16 In addition, TST answers Defendants’ point that TST has not alleged any damages relating
 17 to the Allies page not by identifying any factual allegations relating to damages, but by pointing
 18 to its conclusory statement it has suffered damages. Response at 11 (citing SAC ¶ 89). “The court,
 19 however, need not accept as true a legal conclusion presented as a factual allegation.” *Kische USA,*
 20 *LLC v. Simsek*, No. C16-0168JLR, 2016 WL 6273261, at *2 (W.D. Wash., June 29, 2016). TST
 21 points to *Kische* for the proposition that damages do not need to be plead with specificity.
 22 However, they *do* require at least *some* factual basis. For example, in *Kische* the court found that
 23 the factual allegations that the plaintiff lost business relationships with suppliers and major retail
 24 clients was sufficient to allege damages. *Id.* at *10. Here, TST has not pled any such facts relating
 25 to damages for Defendants’ use of the Allies page, *e.g.*, it has not alleged that it lost members or

26 ⁵ As noted in the Motion to Dismiss at 16, n. 6, TST’s tortious interference claim as to the Chapter page also fails because
 TST has not alleged that its relationship with the Chapter page has been terminated. TST has not disputed this point.

lost income related to the use of the Allies page. Without any factual allegations in support of damages, the mere conclusory statement that it has been damaged is not enough. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This is particularly true for TST’s conclusory statement that it suffered reputational damages as such damages must be pled with particularity. *Kische*, 2016 WL 6273261, at *7 (“Injury to a business’s reputation or goodwill generally constitutes special damages and, as such, must be pleaded with particularity;” dismissing claim for reputational damages where plaintiff offered only “generalized, largely conclusory allegations of reputational injury”).

C. TST’s Conversion and Trespass Claims as to the Chapter Page are Moot

TST does not allege damages for its trespass and conversion claims but instead only seeks injunctive relief. SAC ¶ 99 (“Based on the foregoing, TST is entitled to injunctive relief in the form of a permanent injunction enjoining Defendants from accessing any of TST’s “protected computers” under threat of contempt, an order to return TST’s membership related documents and destroy any copies thereof, and costs and attorney’s fees to be computed after entry of the decree.”); ¶ 105 (not alleging any damages for the conversion claim but instead stating that both the trespass to chattels and conversion claims should be decided in tandem). Pursuant to Article III of the U.S. Constitution, TST has the burden of establishing that its claim for injunctive relief is still a live controversy. Motion to Dismiss at 17-19. However, as to the injunctive relief for the Chapter page, TST has failed to do so. TST does not deny that its requested injunctive relief seeking return of the Chapter page has been moot for well over a year, when it regained administrative control of the Chapter page. See SAC ¶ 4. Nor does TST point to any facts that indicate it could be wronged again, such as facts showing that Defendants continue to have the ability to access the Chapter page. See Response at 13. Thus, TST’s conversion and trespass claims as to the Chapter page are moot and must be dismissed.

D. TST’s Fails to Allege Conversion and Trespass as to Documents and the Allies Page

When property is provided to a bailee, a refusal to return property upon demand is required for the bailee’s retention of the property to become conversion or trespass. *Burton v. City of*

1 *Spokane*, 16 Wn. App. 2d 769, 771, 482 P.3d 968 (2021) (citing *Judkins v. Sadler-Mac Neil*, 61
 2 Wn.2d 1, 5, 376 P.2d 837 (1962)); *Guar. Nat. Ins. Co. v. Mihalovich*, 72 Wn. 2d 704, 710, 435
 3 P.2d 648 (1967) (“[I]f a bailee merely holds over after the end of the period for which the chattel
 4 was bailed to him, he may be liable for a breach of contract, but he is not guilty of conversion or
 5 of any other tort. He has not deprived the owner of the possession, for there is nothing to show that
 6 the plaintiff may not have the chattel again whenever he desires it.”) (quoting *Salmond on the Law
 7 of Torts* (9th ed. 1936), s 78, p. 310). The same analysis applies to trespass to chattels claims, *i.e.*,
 8 when a party is originally in rightful custody of property, he is not liable for trespass to chattels
 9 unless, upon demand, he refuses to return the property. *See, e.g., In re Alan Wood Steel Co.*, 2 B.R.
 10 161, 163 (Bankr. E.D. Pa. 1980) (“When a bailee, originally in rightful custody of property,
 11 wrongfully refuses to surrender the property *on demand* to the owner, an action either for the full
 12 value (conversion) or for damages (trespass to chattels) will lie.”) (emphasis added); *Zapata v.
 13 Ford Motor Credit Co.*, 615 S.W.2d 198, 201 (Tex. 1981) (“A detention of personality lawfully
 14 obtained, *after demand*, is a wrongful act constituting a trespass.”) (emphasis added). TST fails to
 15 address the undisputed fact that this case involves a bailment. Specifically, TST does not dispute
 16 the fact that the Defendants lawfully obtained possession of the membership documents and the
 17 Allies page as councilors on TST’s advisory council. TST also does not dispute that it has not
 18 alleged that it ever asked Defendants to return either the membership documents or the Allies
 19 page.⁶ Absent any allegation that TST demanded return of the property and Defendants refused,
 20 its conversion and trespass to chattels claims fail as a matter of law.⁷

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 22
 23
 24 ⁶ Nor has TST alleged that it asked Facebook to give it administrative privileges for the Allies page.

25 ⁷ Indeed, one the cases cited by TST, *Burton*, supports this point. In *Burton*, the police, who lawfully obtained a
 26 crime victim’s property were sued by the victim’s mother after the police refused to return the property after
 repeated demands. The case illustrates that the demand/refusal was an essential element to turning the police’s
 lawful possession of the victim’s property into a potential conversion. This case differs significantly from *Burton*
 because TST has never alleged that it ever asked for the return of the property and that Defendants refused.

1 **E. TST's FTDRA Claims Must be Dismissed⁸**

2 **1. TST Fails to Plead Facts Supporting the Alleged Use**

3 TST explains that the essence of its FTDRA claim is that Defendants have a competing
 4 organization that is using TST's marks in the organization's name and that Defendants are using
 5 the Allies page to promote the organization in competition with TST. Response at 15. Defendants
 6 moved to dismiss the FTDRA claim because TST has failed to allege *any* facts in support of its
 7 conclusory assertion that such a competing organization exists and is using TST's marks in its
 8 name or otherwise. Motion to Dismiss at 20-22. TST completely fails to address this argument.
 9 Instead, TST simply repeats the same conclusory statement that there is a competing organization
 10 and, based on a third party's comment to a Facebook post, that it was initially planned to be named
 11 either "The Satanic Temple 2: Electric Boogaloo" or "Satanic Washington-Archived Temple
 12 Chapter." Response at 15; Motion to Dismiss at 20-22. TST does not point to a single factual
 13 allegation in the SAC that plausibly suggests that such an organization exists, *i.e.*, no facts as to
 14 when it was established, what type of organization it is, what its current name is, where it is located,
 15 who runs it, whether it has any members, etc.⁹ Absent even a single alleged fact that would allow
 16 the Court plausibly to infer the existence of a competing organization that is using TST's marks to
 17 compete against it, TST's has failed adequately to plead that its marks are being used.

18 **2. TST Fails Adequately to Allege Commercial Use of Its Marks**

19 TST has also failed adequately to allege that its marks are being used for a commercial
 20 purpose. The FTDRA expressly provides that any noncommercial use of a mark is not actionable
 21 as either dilution by blurring or tarnishment. 15 U.S.C. § 1125(c)(3)(C). TST does not address or
 22 dispute Defendants' argument that their alleged use of TST's mark for purposes of their critical
 23 commentary does not constitute a commercial use. Motion to Dismiss at 21-23. And indeed

24

25 ⁸ TST does not dispute that if the Court dismisses the CFAA and FTDRA claims there is no remaining basis for
 26 federal question jurisdiction over any remaining state law claims. Thus, if the Court dismisses the CFAA and FTDA
 claims, it should decline to exercise supplemental jurisdiction over any remaining state law claims.

⁹ If a competing organization actually existed, TST would have undoubtedly included it as a party in this action.

1 FTDRA expressly provides that use of marks for criticism is a fair use. 15 U.S.C. §
 2 1125(c)(3)(A).¹⁰ Instead, TST continues to loop back to its unsupported conclusory allegation that
 3 Defendants are running an organization that is competing with TST for donations, members, and
 4 merchandise sales and that this competition constitutes commercial use. Response at 16. Again,
 5 lacking a single factual allegation indicating the existence of a competing organization this
 6 argument is insufficient to establish commercial use.

7 **3. TST Fails to Allege that It has a Famous Trademark in the Allies Page**

8 In addition to not establishing the required elements of commercial use, TST also fails
 9 adequately to plead dilution by blurring or tarnishment. A dilution claim requires that (1) the mark
 10 is famous and distinctive; (2) the defendant is making use of the mark in commerce; (3) the
 11 defendant's use began after the mark became famous; and (4) the defendant's use of the mark is
 12 likely to cause dilution by blurring or dilution by tarnishment. "A mark is famous 'if it is widely
 13 recognized by the general consuming public of the United States as a designation of source of the
 14 goods or services of the mark's owner.'" *A.V.E.L.A., Inc. v. Estate of Marilyn Monroe*, 131 F.
 15 Supp. 3d 196, 215 (S.D.N.Y. 2015) (quoting 15 U.S.C. § 1125(c)(2)(A)). Courts have recognized
 16 that "the inclusion . . . of the phrase 'widely recognized by the general consuming public of the
 17 United States' 'was intended to reject dilution claims based on niche fame, i.e. fame limited to a
 18 particular channel of trade, segment of industry or service, or geographic region.'" *Solid 21, Inc.*
 19 *v. Jomashop Inc.*, No. 19-CV-1179 (MKB), 2020 WL 9816843, at *11 (E.D.N.Y. Nov. 30, 2020)
 20 (quoting *Luv N' Care Ltd. v. Regent Baby Prods. Corp.*, 841 F. Supp. 2d 753, 757–58 (S.D.N.Y.
 21 2012)). Failure to allege facts that indicate that the mark is famous beyond a niche audience
 22 requires dismissal. *Id* (dismissing dilution claim for failing adequately to allege the mark was
 23 famous).¹¹

24 ¹⁰ "The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection: . . .
 25 (ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of
 the famous mark owner."

26 ¹¹ See also, e.g., *Stroud v. Richmond*, No. 4:17-CV-01469-KAW, 2017 WL 3782700, at *2 (N.D. Cal. Aug. 31,
 2017) (dismissing dilution claim for failing to allege that the mark was famous); *Wellnext LLC v. OVM LLC*, No.

1 TST claims that the Allies page (entitled “TST WA Allies”) bears TST’s trademark and
 2 that by using the Facebook page to sell products for a competing organization Defendants are liable
 3 for dilution by blurring. Response at 16-17. However, in addition to alleging no facts to support
 4 the existence of the alleged competing organization, TST does not identify what the alleged
 5 trademark on the Allies page is (is it the name “TST WA Allies”?) and does not allege that the
 6 unidentified trademark is famous or that it is famous beyond a niche audience. Without these
 7 required allegations, TST’s dilution claim fails as a matter of law. Further, the harm that TST
 8 alleges for its tarnishment claim makes it clear that TST’s true concern is that Defendants had the
 9 audacity to criticize TST’s practices and beliefs. TST argues that Defendants have harmed TST by
 10 falsely associating TST “with ableism, misogyny, racism, fascism, transphobia, and the
 11 endorsement of brutality, as well as political extremist organizations.” Response at 18. (This is the
 12 same allegation upon which TST based its dismissed defamation claim). However, the FTDRA
 13 expressly provides that it does not apply to the use of a mark for criticism or commentary. 15
 14 U.S.C. § 1125(c)(3)(A). TST has failed to adequately allege claims under the FTDRA.

15 **F. TST Should not be Permitted to Amend.**

16 Liberality in granting leave to amend is subject to limitations, including undue prejudice
 17 to the opposing party, bad faith by the movant, and futility. *Cafasso, U.S. ex rel. v. Gen. Dynamics*
 18 *C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011). Further, “[t]he district court’s discretion to
 19 deny leave to amend is particularly broad where plaintiff has previously amended the
 20 complaint.” *Id.* TST has been allowed three bites at the apple through its original Complaint, its
 21 First Amended Complaint, and its current Second Amended Complaint. TST has had more than
 22 adequate opportunities to plead viable claims against Defendants. TST knows that Defendants
 23 have limited financial means and its repeated attempts to fish for claims against them is nothing
 24 more than an attempt to punish former members for their critical opinions. Enough is enough.

25

26

17-CV-62107, 2018 WL 7048129, at *5 (S.D. Fla. Feb. 16, 2018) (dismissing dilution claim for failure to allege
 beyond a conclusory statement that the mark was famous).

DATED: July 2, 2021.

ARETE LAW GROUP PLLC

By: /s/ Jeremy Roller

Jeremy E. Roller, WSBA No. 32021
1218 Third Avenue, Suite 2100
Seattle, WA 98101
Phone: (206) 428-3250
Fax: (206) 428-3251
jroller@aretelaw.com

Attorneys for Defendants David Alan Johnson, Leah Fishbaugh, Mickey Meehan, and Nathan Sullivan

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ARÈTE LAW GROUP
1218 THIRD AVE., STE 2100
SEATTLE, WA 98101
O: (206) 428-3250

CERTIFICATE OF SERVICE

I, Janet Fischer, certify that on July 2, 2021, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, thereby sending a notification of such filing to the following parties:

Benjamin Justus
Lybeck Pedreira & Justus, PLLC
Chase Bank Building
7900 SE 28th Street, Fifth Floor
Mercer Island, WA 98040
(206) 687-7805
ben@lpjustus.com

Matthew A. Kezhaya
Kezhaya Law PLC
1202 NE McClain Rd
Bentonville, AR 72712
(479) 431-6112
matt@kezhaya.law

DATED: July 2, 2021, at Seattle, Washington.

/s/ Janet Fischer
Janet Fischer
Paralegal

**REPLY IN SUPPORT OF
MOTION TO DISMISS
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ARÈTE LAW GROUP
1218 THIRD AVE., STE 2100
SEATTLE, WA 98101
O: (206) 428-3250